Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-993

CLEO JACKSON ..... *Petitioner*

v.

UNITED STATES OF AMERICA ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in the appeal of the petitioner from his criminal conviction for violation of 18 U.S.C. §1503, Case No. 79-1371.

OPINIONS BELOW

The United States District Court for the Western District of Arkansas issued an unpublished Memorandum Opinion concerning the question presented for review. A copy of the opinion is appended hereto beginning at page A-1, as Appendix "A".

The opinion of the United States Court of Appeals for the Eighth Circuit has not yet been reported. A copy of the opinion is appended hereto beginning at page A-5, as Appendix "B".

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was rendered October 31, 1979. Its judgment was entered November 26, 1979.

The order of the United States Court of Appeals for the Eighth Circuit denying the petitioner's Petition for Rehearing was entered November 26, 1979.

The Supreme Court has jurisdiction pursuant to 28 U.S.C. §1254, which provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . .

QUESTION PRESENTED FOR REVIEW

WHETHER COMMENTS TO ACQUAINTANCES WHO ARE MEMBERS OF THE PANEL FROM WHICH JURORS ARE TO BE DRAWN CONSTITUTES OBSTRUCTION OF JUSTICE UNDER 18 U.S.C. 1503, WHERE THE PETITIONER MERELY VOICED HIS OPINION OF THE ACTIONS OF THE GOVERNMENT IN A PENDING CRIMINAL CASE, WITHOUT ATTEMPTING TO COERCE THE PROSPECTIVE JURORS BY THREATS, BRIBES OR ANY OTHER INTIMIDATING ACTION.

STATUTE INVOLVED

This case involves the interpretation of the following statute:

18 U.S.C. §1503; Vol. 4, U.S.C. p. 1192 (1976 Ed.):

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, magistrate, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

This case involves the criminal conviction of the petitioner for two counts of obstruction of justice under 18 U.S.C. §1503 by contacting two members of the panel from which jurors were to be selected in a pending criminal case. The United States District Court had jurisdiction to hear the case under 18 U.S.C. §3231. There is no material dispute as to the facts.

The case of UNITED STATES OF AMERICA v. TILLEY, NIXON, and DANIELS, Criminal No. 78-380003-01, 02, 03 was set for trial in the United States District Court for the Western District of Arkansas on June 26, 1978. The petitioner had met Mr. Tilley, one of the defendants.

Mr. Richard Greer and Mrs. Shirley Turner were on the list from which the jury for the above case was to be drawn. Mr. Greer was a long-time friend of the petitioner, both having lived in the small community of Green Forrest, Arkansas, for many years, and they saw each other daily. Mrs. Turner was a casual acquaintance of the petitioner. She worked as a waitress at a local restaurant, where the petitioner ate at least once a week.

During the course of his daily activities, the petitioner met these two people during the week prior to the trial of the above case. He met Mr. Greer on the streets of downtown Green Forrest, Arkansas. He met Mrs. Turner at the restaurant when he went there for lunch and sat at one of the tables which she served, the only table available that day.

During the course of the conversations, the petitioner either found out that the others were on the jury panel, or told them that he knew they were on the jury panel. He stated that he had a friend coming up for trial, without mentioning the name of the friend. He said that he felt that the Government was railroading his friend, and that the two should "listen for the word harassment."

ARGUMENT

WHETHER COMMENTS TO ACQUAINTANCES WHO ARE MEMBERS OF THE PANEL FROM WHICH JURORS ARE TO BE DRAWN CONSTITUTES OBSTRUCTION OF JUSTICE UNDER 18 U.S.C. §1503, WHERE THE PETITIONER MERELY VOICED HIS OPINION OF THE ACTIONS OF THE GOVERNMENT IN A PENDING CRIMINAL CASE, WITHOUT ATTEMPTING TO COERCE THE PROSPECTIVE JURORS BY THREATS, BRIBES OR ANY OTHER INTIMIDATING ACTION.

The lower courts have determined that the actions of the petitioner fell within the scope of 18 U.S.C. §1503. In doing so, they relied upon two decisions of this Court, *United States v. Russell,* 255 U.S. 138 (1921), and *Osborn v. United States,* 385 U.S. 323 (1966). However, the lower courts have extended the scope of the statute beyond its application in those cases.

The facts of the cases relied upon are significantly different from those in the instant case. In *United States v. Russell, supra,* the defendant called the wife of a prospective juror, asking her to find out how her husband felt about a pending criminal case, telling her that he did not want to pay money to any of the petit jurors who would not favor acquittal. In *Osborn v. United States, supra,* the defendant asked the cousin of a prospective juror in the trial of Jimmy Hoffa to convey to his cousin an offer of money if he were chosen for the jury, with more to come if the jury was unable to reach a verdict.

The lower courts have interpreted these cases to mean that any contact with a prospective juror can constitute

obstruction of justice. However, in determining the definition of the words in the statute, this Court stated:

> "The word of the section is 'endeavor,' and by using it the section got rid of the technicalities which might be urged as besetting the word 'attempt,' and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent. . . . The section . . . is not directed at success in corrupting a juror but at the 'endeavor' to do so. Experimental approaches to the corruption of a juror are the 'endeavor' of the section." *United States v. Russell, supra,* at 143, *Osborn v. United States, supra,* at 333.

First, the actions of the petitioner were not an "effort or essay to accomplish the evil purpose that the section was enacted to prevent." Though never defined by this Court, a lower court has stated, "The statute in question is designed to achieve the twin goals of protecting the participants in a specific proceeding and of preventing a miscarriage of justice in a case pending in a federal court." *United States v. Metcalf,* 435 F.2d 754, 756 (9th Cir. 1970). The petitioner voiced his opinions of a pending case to two prospective jurors. There was no threat to the safety of the prospective jurors, and the statute need not be applied to protect them. Nor would the actions of the petitioner cause a miscarriage of justice. The petitioner had not coerced or bribed the prospective jurors. If the comments of the petitioner colored their opinions of the case, the prospective jurors would be excused from the jury.

Second, the actions of the petitioner were not "experimental approaches to the corruption of a juror." The petitioner talked to two acquaintances who were

prospective jurors about a pending case. There was no indication that he would later contact them if they were chosen for the jury to complete some plan of corruption. He was not trying to determine whether the prospective jurors would be willing to consent to later accepting a bribe, as were the defendants in *Russell* and *Osborn*.

CONCLUSION

The petitioner respectfully submits that the lower courts erroneously interpreted 18 U.S.C. §1503 and the prior decisions of this Court, and asks that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit, in order for this Court to clarify its prior decisions and determine the limits of 18 U.S.C. §1503.

Respectfully submitted,

BALL AND MOURTON

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CERTIFICATE OF SERVICE

I, Kenneth R. Mourton, one of the attorneys of record for the Petitioner, Cleo Jackson, state on oath that I have on this —— day of December, 1979, served a copy of the above and foregoing upon Mr. Larry McCord, United States Attorney, United States District Court, P.O. Box 1524, Fort Smith, Arkansas 72901.

/s/ Kenneth R. Mourton

APPENDIX "A"

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF ARKANSAS

HARRISON DIVISION

UNITED STATES OF AMERICA ..... *Plaintiff*

v. No. 78-30010-01

CLEO JACKSON ..... *Defendant*

MEMORANDUM OPINION

This is a criminal case in which the defendant, Cleo Jackson, is charged with two counts of jury tampering in violation of 18 U.S.C. §1503. The case is before the Court on defendant's motion to dismiss the indictment.

Count I of the indictment is as follows:

> That on or about the 22nd day of June, 1978 in the Western District of Arkansas, CLEO JACKSON knowing that Shirley Ann Turner had been selected to be a member of the petit jury panel from which jurors were to be drawn for a pending criminal case, to wit: U. S. v. Tilley, Nixon and Daniels, Criminal Number 78-30003-01, 02, 03, corruptly did endeavor to influence, obstruct, and impede the due administration of justice in the United States District Court for the Western District of Arkansas by the personal contacting of Shirley Ann Turner and the making of statements regarding the merits of said pending criminal case in violation of 18 U.S.C. §1503.

Count II of the indictment is identical but that the person allegedly contacted is Richard Greer.

18 U.S.C. §1503 provides in part as follows:

> Influencing or injuring officer, juror or witness generally: Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes or endeavors to influence, obstruct, or impede, the due administration of

> justice, shall be fined not more than $5,000.00 or imprisoned not more than five years or both.

The defendant has moved to dismiss the indictment on the grounds that neither Shirley Ann Turner nor Richard Green were not members of a jury at the time of the alleged contact, but were merely veniremen. The defendant contends that the statute must be strictly construed to apply only to jurors who have been sworn to decide a case. The defendant also contends that any possibility of miscarriage of justice would have been eliminated during the jury selection process, including *voir dire* examination.

In *United States v. Russell,* 255 U.S. 138 (1921) the United States Supreme Court reversed a dismissal of the indictment which charged the defendant with endeavoring to corruptly influence a venireman "though he was not yet selected or sworn." In *United States v. Osborn,* 385 U.S. 323 (1966) the conviction was affirmed where the defendant was charged with endeavoring to bribe a venireman. In each case the court has pointed out that "endeavor" as used in the statute has a broader meaning than "attempt." The cases hold that one may be endeavoring to corrupt a petit juror by contacting a venireman, even though the venireman has not been seated as a petit juror to try the case.

The defendant cites this Court to *United States v. Halderman,* 559 F.2d 31 (D.C. Cir. 1977) a case which affirmed the convictions of several well-known participants in the Watergate affair, over defendants' contentions concerning pretrial publicity, the extent of *voir dire* examination and other issues not pertinent to the case at bar. In the *Halderman* opinion the court recites the function of *voir dire* and points out the distinction between veniremen and jurors. We find nothing in the *Halderman* opinion

which would require this Court to dismiss the indictment in the case at bar.

The defendant distinguishes *United States v. Russell, supra,* and *United States v. Osborn, supra,* on the grounds that the "endeavor" involved the payment of money to the venireman whereas Cleo Jackson is not charged with bribing the two prospective jurors.

We do not find this distinction conclusive. It is well established that any endeavor to corruptly influence a juror is what 18 U.S.C. §1503 prohibits, regardless of whether the endeavor involves bribery or not. *Bosselman v. United States,* 239 F. 82 (2d Cir. 1917); *United States v. Cioffi,* 493 F.2d 1111 (2d Cir. 1974). The crux of the offense is a "corrupt endeavor." The indictment charges Mr. Jackson with having made an endeavor. It is for the jury to determine whether the defendant made a corrupt endeavor. *United States v. Roe,* 527 F.2d 629 (4th Cir. 1975).

The Clerk will prepare an order denying defendant's motion to dismiss the incident.

DATED: This 1st day of December, 1978.

FILED: October 4, 1978.

/s/ Paul X. Williams

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 79-1371

UNITED STATES OF AMERICA, *Appellee* v. CLEO JACKSON, *Appellant*	Appeal from the United States District Court for the Western District of Arkansas.

Submitted: September 14, 1979

Filed: October 31, 1979

Before STEPHENSON and McMILLIAN, Circuit Judges, and HANSON,* Senior District Judge.

STEPHENSON, Circuit Judge.

Defendant Jackson appeals from a jury conviction on two counts of corruptly endeavoring to influence and impede two petit jurors in violation of 18 U.S.C. §1503.[1] On appeal he contends that the jury instructions were inadequate, more particularly that the court erred in refusing to give his requested instruction on specific intent; the evidence was insufficient to sustain his conviction; his

[1] The Honorable Paul X. Williams, Chief Judge, United States District Court for the Western District of Arkansas, presiding, imposed a split sentence of three months imprisonment, one year probation and a $5,000 fine.

* The Honoable William C. Hanson, Senior United States District Judge for the Southern District of Iowa, sitting by designation.

actions did not fall within the scope of 18 U.S.C. §1503; the court further erred in instructing that veniremen come within the scope of 18 U.S.C. §1503; and the district court erred in refusing to grant a continuance to permit the testimony of additional character witnesses unable to be present because of inclement weather. We affirm.

The evidence most favorable to the jury verdict discloses that Shirley Ann Turner and Richard Greer had been selected to be members of the petit jury panel from which jurors were to be drawn for a pending criminal case entitled *United States v. Tilley, et al.* when they were approached by appellant Jackson about the pending case. The *Tilley* case had been scheduled for trial Monday, June 26, 1978. On June 22, 1978, appellant engaged in a conversation with jury panelist Turner at the cafe where she was employed. During the course of this conversation appellant asked Mrs. Turner if she was going to show up in court Monday morning. When Mrs. Turner asked appellant "how he knew that I was even supposed to be there and he [appellant] said 'I have my ways of finding out.' " Appellant then pulled a sheet of paper out of his pocket and started reading names of prospective jurors.

Mrs. Turner asked appellant what the trial was about and he responded, "It is a friend of mine and the federal boys are trying to railroad him." Appellant added, "I am going to tell you one thing to listen for, listen for the word 'harassment' and that is all I am going to say."

The following day Mrs. Turner received a telephone call from a clerk of the court informing her that she had been excused from jury duty because of her poor health. Mrs. Turner told the clerk about the previous day's incident

with appellant Jackson. Later the court was informed of the possibility that veniremen had been contacted and dismissed the entire panel of veniremen and directed the clerk to summon a completely new panel and rescheduled the case for trial in July.

Jury panelist Richard Greer was likewise contacted by appellant prior to Tilley's scheduled trial, and after confirming that Greer was on the panel,[2] appellant said "he had a friend who the government had been tormenting or harassing around." Some time later in an interview with two FBI agents appellant stated he told Greer that his friend, a banker at Marshall, was going to be on trial at Harrison and that he had asked Greer to listen for the word "harassment." Appellant also stated that he had told Mrs. Turner that he had a friend coming up for trial and for her to listen for the word "harassment"; further, that he may have made the statement to her that the federal boys are trying to railroad him.

Appellant testified at the trial with reference to his conversations with Mrs. Turner and Mr. Greer. He testified that he told them, "I had a friend coming up in court, listen for the word 'harassment' and vote your convictions."

Initially, appellant contends that the trial court erred in refusing to instruct the jury on the definition of specific intent, as requested by the defendant. The trial court instructed as follows:

> To establish the offense charged in each count of the indictment, the government must prove that Cleo Jackson acted corruptly and with the specific

[2] Greer testified, "He (appellant) said 'you are on the petit jury aren't you?' and I said 'yes.' "

intent of influencing Mrs. Turner and/or Mr. Greer in the discharge of their duties and to influence, obstruct and impede the due administration of justice.

In this case, the word "corruptly" means willfully, knowingly, and with the specific intent to influence a juror to abrogate his or her legal duties as a petit juror.

The phrase "obstruct, influence and impede the due administration of justice" includes any endeavor, done corruptly and with the specific intent, to influence a juror to abrogate his or her legal duties as a petit juror.

No crime has been committed when one merely urges a juror to perform his or her legal duties. 18 U.S.C. Sec. 1503 prohibits one from endeavoring to make a juror not perform his legal duties or to do something in violation of the juror's legal duties.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and act done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said,

it is entirely up to you to decide what facts to find from the evidence.

Appellant particularly contends that the foregoing instruction is inadequate because it fails to define "corruptly" to mean "a defendant acted with improper motive or with bad or evil or wicked purpose"; also, that "willfully" and "specific intent" should have been further defined.

It is well established that a court is not bound to accept the language of a requested instruction, nor to give a proposed requested instruction if the court gives it in substance. *United States v. Nance,* 502 F.2d 615, 619-20 (8th Cir. 1974), *cert. denied,* 420 U.S. 926 (1975). In reviewing the adequacy of jury instructions, the court must consider the charge as a whole. *United States v. Cartano,* 534 F.2d 788, 793 (8th Cir.), *cert. denied,* 429 U.S. 843 (1976). *See also United States v. Johnson,* 585 F.2d 119, 128 (5th Cir. 1978). We are satisfied that the issue of specific intent in the context of this case was properly submitted to the jury and the motion for a new trial was appropriately denied.

Appellant next argues that the trial court erred in denying his post-trial motion for judgment of acquittal on the grounds that the evidence was insufficient to support his conviction. The court properly instructed the jury as to the three essential elements that must be found beyond a reasonable doubt to establish defendant's guilt in this case: (1) that the defendant had contacted Shirley Turner and/or Richard Greer who had been selected to serve on the panel from which petit jurors were to be selected in the pending criminal action; (2) that by said contact the defendant endeavored to influence and impede them in the discharge of their duties as members of the jury; and (3) that the defendant's actions were done corruptly. Appel-

lant concedes that the government proved the first two elements but failed to prove that the actions of appellant were done corruptly. He argues that his testimony "I took it on my own to say something in Jim Tilley's behalf to two of the jurors" does not show any specific intent. Furthermore, the circumstantial evidence fails to establish specific intent. His contact with the potential jurors was of a casual nature. He did not threaten or bribe either prospective juror or tell them how to vote. In sum, he argues that there is not sufficient relevant evidence in this case from which a reasonable mind could conclude that appellant acted with specific intent. We disagree.

There was substantial evidence from which the jury could reasonably conclude that appellant willfully, knowingly, and with specific intent sought to influence the named members of the jury panel to abrogate his or her legal duties as a juror. The testimony of Mr. Greer and Mrs. Turner reveals statements made by the defendant which a reasonable person might well conclude were an attempt to influence a juror in the discharge of his or her duties. Since it is a juror's duty to render a verdict based on the evidence presented at the trial, the defendant's description of the government's case against Mr. Tilley as "tormenting," "railroading" and "harassing" can reasonably be seen as an endeavor on the part of defendant to interpose his opinion into matters which were ultimately the sole province of the jury. We are satisfied that the evidence amply supports the jury's essential finding of defendant's specific intent to impede or influence the due administration of justice in this case. *See Leffler v. United States,* 409 F.2d 44, 50-51 (8th Cir. 1969).

Appellant contends the trial court erred in denying his motion for judgment of acquittal on the grounds that the actions of the appellant did not fall within the scope of 18 U.S.C. §1503. Initially, he contends that Mrs. Turner and Mr. Greer were not petit jurors and thus not within the proscription of the statute. It is abundantly clear that a venireman comes within the proscription of the statute. In *United States v. Russell,* 255 U.S. 138 (1921), the Supreme Court reversed a dismissal of an indictment which charged the defendant with endeavoring to corruptly influence a petit juror "though he was not yet selected or sworn." A venireman is a prospective juror. *United States v. Haldeman,* 559 F.2d 31, 59 n. 27 (D.C. Cir. 1976). Thus, appellant's contention that the trial court erred in instructing the jury that venireman comes within the scope of 18 U.S.C. §1503 is devoid of merit.

It is also clear that the statute makes an offense of any proscribed "endeavor." In *Osborn v. United States,* 385 U.S. 323, 333 (1966), the Supreme Court pointed out the significance of the word "endeavor" by quoting from *United States v. Russell, supra*:

> "The word of the section is 'endeavor,' and by using it the section got rid of the technicalities which might be urged as besetting the word 'attempt,' and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent. . . . The section . . . is not directed at success in corrupting a juror but at the 'endeavor' to do so. Experimental approaches to the corruption of a juror are the 'endeavor' of the section." *United States v. Russell,* 255 U.S. 138, 143.

In both *Osborn* and *Russell* the endeavor to bribe a prospective juror was made through an intermediary. The juror was not actually contacted. Nevertheless, the Supreme Court held there was an endeavor within the proscription of the statute. Thus, appellant's further claim that any obstruction of the due administration of justice would be limited to intimidating actions is without merit. The gist of the offense is the corrupt endeavor. See *United States v. Cioffi,* 493 F.2d 1111, 1118-19 (2d Cir. *cert. denied,* 419 U.S. 917 (1974). A non-coercive but corrupt attempt to influence is within the conduct proscribed by Section 1503. *See United States v. Walasek,* 527 F.2d 676, 679 n. 9 (3d Cir. 1975). As indicated in *Russell,* success in the endeavor to corrupt is not essential.

Appellant further contends that the trial court erred in denying his motions for a continuance because five character witnesses who had not been subpoenaed but had planned to testify were unable to travel to the trial because of inclement weather. The trial court, after ascertaining that the absent witnesses were going to testify only as to defendant's character, inquired of the government as to whether it planned to offer any evidence in opposition to reputation evidence already offered by the defense. When the government replied in the negative, the court stated:

> The fact that five character witnesses have testified and the proposed witnesses would testify [only to the defendant's character], and the government plans no opposition testimony, the motion will be overruled.

The granting of a continuance is clearly within the discretion of the trial court. Here it is obvious there was no abuse

of discretion in refusing to grant a continuance. *See United States v. Little,* 567 F.2d 346, 348-49 (8th Cir. 1977), *cert. denied,* 435 U.S. 967 (1978).

The conviction is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT